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ABSTRACT

Congressional attempts to curb the power of the Federal courts in the area of school desegregation date largely from the Supreme Court's decision in Swann v. Charlotte-Mecklenburg Board of Education in 1971. It is a response to the court's approval in that case of busing as a remedy that may in some circumstances be used to alleviate the effects of de jure racial segregation. Opposition to busing appears to command a majority in Congress. This has not yet led to a head-on confrontation with the courts because legislation thus far enacted has been framed to avoid constitutional difficulties. And it now appears that the primary focus of congressional interest is an anti-busing amendment to the Constitution. Analysis of the proposed amendments and statutes requires a review of both the existing statutes and the case law, which is made here. The constitutionality of past and present anti-busing efforts is then assessed. It is noted that the present session of Congress has seen attempts at the passage of further anti-busing legislation that are significant not so much because of the nature of the proposed legislation as because of the support it has gathered. If a constitutional amendment is to be passed, which is believed unlikely, then more legislation will probably be forthcoming and a clash with the judiciary may be unavoidable. (Author/JM)

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COURT, CONGRESS, AND SCHOOL DESEGREGATION

Robert B. McKay*

The Constitution of the United States provides for a three-way separation of power, giving substantial but not unlimited authority to Congress, to the President, and to the federal courts. A system that allows one branch to define the power of each of the other branches, and the limitations on each, invites conflict. This is particularly true when the power of final decision is given to the judicial branch, which has been properly described as the least powerful because it commands neither the power of purse nor sword.

Accordingly, it is not surprising that American constitutional history includes a number of instances of tension between Court and Congress or between Court and President. The highlights are familiar.

* President Jefferson was furious with Chief Justice Marshall's rebuke to President and to Congress in Marbury v. Madison in 1803, but rendered impotent by a decision technically in his favor.

* President Jackson is alleged to have threatened darkly: "Mr. Marshall has made his decision. Now let him enforce it."

* The 1857 Dredd Scott decision, holding slaves to be property and not persons, was one of the factors that led to the Civil War.

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* President Lincoln almost certainly overstepped his constitutional authority during the Civil War, but the Supreme Court offered no challenge until after the war was over.

* The constitutionality of the Reconstruction Acts was not tested when Congress' power to deny appellate jurisdiction to the Supreme Court was upheld in Ex Parte McCardle in 1869.

* President Franklin Roosevelt's dissatisfaction with the Supreme Court treatment of New Deal legislation resulted in efforts to enlarge the Court and thus presumably to change the course of decision. When his plan was labeled "Court-packing," the proposal was doomed, and Roosevelt suffered his first serious setback at the hands of Congress.

* In the mid-fifties there were repeated attempts to amend the Constitution to overturn Supreme Court decisions unpopular in Congress and assertedly with the public as well. But all were defeated, the Bricker Amendment to modify the treaty power and a series of proposals arising out of the anti-Communist sentiments of the time.

* In the mid-sixties there was a substantial campaign to modify the one-man, one-vote principle of the Reapportionment Cases. But this also failed, perhaps significantly in this instance because the public, which in general approved the Supreme Court rulings, eventually made that view clear to its elected representatives.

Now comes the turn of school desegregation, with Supreme Court rulings that are publicly applauded, but, in many cases, privately disapproved. After the initial stir created by Brown v. Board of Education, implementation went forward slowly until the late

sixties with the decisions in Jefferson, Green and Alexander (to be discussed below) that made imperative immediate steps for effective desegregation. At the time that was generally acceptable because Congress and the President were in step with the Court. This meant that compliance was actively encouraged by each branch of the federal government. When no respectable voice was raised against desegregation, rapid progress was possible, North and South. The high tide of forward movement probably was in 1971 when, in the Swann cases (also discussed below), the Supreme Court recognized busing as a remedy that might be constitutionally necessary in some circumstances.

It was then that it was discovered that to describe busing as "forced" would allow revival of old prejudices, particularly when expressions of bias, even hate, were made respectable by the President of the United States. The not surprising results were a near-total stop of voluntary desegregation efforts and the present legislative campaign to restrict the remedies available to the federal courts in the limitation of segregation. The turnaround in attitude and practice is a tragedy of the first magnitude.

Congressional attempts to curb the power of the federal courts in the area of school desegregation date largely from the Supreme Court's decision in Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971). It is a response to the Court's approval in that case of busing as a remedy that may in some circumstances be used to alleviate the effects of de jure racial segregation. On the surface, therefore, the opposition is to busing and not to the entire process of school desegregation. This is consistent with polls that reveal an increasing public acceptance of school integration [1]

and increasing resistance to busing as a means of accomplishing integration.[2] However, the history of the resistance to school desegregation over the past two decades[3] makes it difficult to accept the idea that racism plays no part in the anti-busing movement.

Whatever its sources, opposition to busing appears to command a majority in Congress. This has not yet led to a head-on confrontation with the courts because legislation thus far enacted has been framed to avoid constitutional difficulties. And it now appears that the primary focus of congressional interest is an anti-busing amendment to the Constitution. While, to the proponents of busing, this would be far more serious than legislation, an amendment would not raise the possibility of a clash with the judicial branch. Moreover, the prospects for passage of a constitutional amendment are highly speculative.

Analysis of the proposed amendments and statutes requires a review of both the existing statutes and the case law. It will then be possible to assess the constitutionality of past and present anti-busing efforts.

Background to Swann

Inevitably, analysis of school desegregation law must begin with Brown v. Board of Education, 347 U.S. 483 (1954) (Brown I). That landmark opinion contained no ruling on relief. Instead, the remedy in the four cases before the Brown Court was announced one year later in Brown v. Board of Education, 349 U.S. 254 (1955) (Brown II), where it was held that the plaintiffs were to be admitted to the public schools on a racially nondiscriminatory basis "with all deliberate speed." ~~Id. at 301.~~ This general language proved spectacularly unsuccessful in giving direction to the lower courts in the enormously difficult process of remedying school desegregation.

The nature of the obligation imposed on school boards by Brown II was left for clarification in the lower courts. When the cases before the Brown Court were remanded, the district court in one of these cases described the duty of school officials in what came to be a very well known passage:

> [I]t is important that we point out exactly what the Supreme Court has decided and what it has not decided in this case. It has not decided that the federal courts are to take over or regulate the public schools of the states. It has not decided that the states must mix persons of different races in the schools or must deprive them of the right of choosing the schools they attend. What it has decided, and all that it has decided, is that a state may not deny to any person on account of race the right to attend any school that it maintains. This ... the state may not do directly or indirectly; but if the schools which it maintains are open to children of all races, then no violation of the Constitution is involved even though the children of different races voluntarily attend different schools. . . . The Constitution, in other words, does not require integration. It merely forbids discrimination.

Briggs. v. Elliott, 132 F. Supp. 776, 777 (E.D.S.C. 1955). This distinction between integration and desegregation established the formula for remedial procedures in the first decade after Brown. In the court opinions a short phrase drawn from Briggs - "the Constitution does not require integration, it merely forbids segregation" soon became a familiar refrain.[4] Under this formula little integration took place because school boards were required to do nothing other than to avoid the official assignment of students to particular schools according to race. Despite the maintenance of segregation in virtually all southern school systems, this period saw the first congressional attempts to curb the federal courts in the area of school desegregation;[5] but no legislation was enacted.

The mid-sixties saw major changes in school desegregation law. Impetus for these changes came from the passage of the 1964 Civil Rights Act and the growth of the civil rights movement.[6] It is worth noting that during this time - indeed, during the entire period from 1955 until 1967 - the Supreme Court decided few desegregation cases and provided little help for the lower courts.[7] The burden of desegregating the southern schools was borne by the lower courts, a fact to be considered when legislation is proposed that would eliminate or diminish the power of these courts to remedy school segregation.

In the mid-sixties the lower courts began to abandon the Briggs dictum in favor of a rule that school boards in formerly de jure segregated systems were charged with an affirmative duty to integrate black and white students. The new standard became: "The only school desegregation plan that meets constitutional standards is one that works." United States v. Jefferson County Board of Education, 372 F.2d 836, 847 (5th Cir. 1966), aff'd en banc, 380 F.2d 385, cert. denied, 389 U.S. 840 (1967). This case was extremely important to the development of school desegregation law; most of the problems it considered continue to plague the law today.[8]

The Circuit Courts adopted conflicting positions on the affirmative duty question[9] until the issue was resolved by the Supreme Court in Green v. County School Board, 391 U.S. 430 (1968). In Green the Supreme Court rejected a freedom-of-choice plan that had failed to produce any significant amount of integration. The evil in the system, according to the Court, was that "[r]acial identification of the system's schools was complete," id. at 435, and this was deemed to be "precisely the pattern of segregation to which Brown I and Brown II were particularly addressed,

and which Brown I declared unconstitutionally denied Negro school children equal protection of the laws." Ibid.

To remedy this segregation, the Court held that the school board was "charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch." Id. at 437-38. The burden was placed on the school board "to come forward with a plan that promises realistically to work, and promises realistically to work now." Id. at 439 (emphasis in original). While this decision indicated that further delay would not be tolerated and established the affirmative duty as national law, it did not order any busing. Because the school system in the Green case was set in a rural county with no housing segregation, the Court suggested that zoning, i.e., a "neighborhood school" plan, would be appropriate. Id. at 439. In retrospect, however, it is clear that busing orders had to result if Green was to be applied to school systems with segregated housing patterns.

Two years after Green the Supreme Court decided Alexander v. Holmes County Board of Education, 396 U.S. 19 (1969). The Alexander Court held that school boards were not entitled to any further delay in implementing desegregation plans

> because continued operation of segregated schools under a standard of allowing "all deliberate speed" for desegregation is no longer constitutionally permissible. Under explicit holdings of this Court the obligation of every school district is to terminate dual school systems at once and to operate now and hereafter only unitary schools.

Id. at 20. Taken together, therefore, Green and Alexander established that school boards in formerly de jure segregated systems could no longer maintain a dual system or racially identifiable schools and that they were required to take immediate steps to remedy segregation. Logically, this meant that where housing segregation existed, it would not be enough to assign students to their neighborhood schools. Instead, actual integration - i.e., the elimination of racially identifiable schools - would have to be accomplished and this would require the identification of students by race and their assignment to schools on that basis.[10]

Swann and Its Companion Cases

This logic prevailed another two years later in Swann v. Charlotte-Mecklenburg Board of Education, supra, the first case that presented a busing order for Supreme Court review. Swann traced the history of the resistance to school desegregation, noting that the "objective today remains to eliminate from the public schools all vestiges of state-imposed segregation." Id. at 15. The district courts have broad equitable powers to accomplish this objective, ibid., and these powers include the use of mathematical ratios as a starting point in shaping remedies, id. at 25, and the assignment of students according to race in order to promote integration, id. at 28.

In the school district involved in Swann "assignment of children to the school nearest their grade would not produce an effective dismantling of the dual system." Id. at 30. Accordingly, the Court approved the busing order. And, recognizing that "[a]n objection to transportation of students may have validity when the time or distance of travel is so great as to either risk the health of the children

or significantly impinge on the educational process," the Court nonetheless held that, "Desegregation plans cannot be limited to the walk-in school." Id. at 30-31.

In evaluating the anti-busing efforts of Congress, the companion cases to Swann are as important as the main decision. First, in Davis v. Board of School Commissions, 402 U.S. 33 (1971), the Court reviewed a district court order that left 12 all-black or nearly all-black elementary schools because a highway divided the metropolitan area of Mobile, Alabama into predominantly white and predominantly black areas and the district court had treated the two areas as distinct "without either interlocking zones or transportation across the highway." Id. at 36. The Court of Appeals had developed a modified plan, but this still left 6 black schools because the eastern and western zones were still treated in isolation from each other. Ibid.

The Supreme Court rejected the approach of treating the two areas in isolation holding that "inadequate consideration was given to the possible use of bus transportation and split zoning." Id. at 38. And, in an important paragraph, the Court stated that:

> [N]eighborhood school zoning, "whether based strictly on home-to-school distance" or on "unified geographic zones," is not the only constitutionally permissible remedy, nor is it per se adequate to meet the remedial responsibilities of local boards. Having once found a violation, the district judge or school authorities should make every effort to achieve the greatest possible degree of actual desegregation, taking into account the practicalities of the situation. A district court may and should consider the use of all available techniques including restructuring of attendance zones and both contiguous and noncontiguous attendance zones. . . . The measure of any desegregation plan is its effectiveness. Id. at 38.

This paragraph serves to emphasize the principle inherent in Swann that once any finding of de jure segregation is made, everything possible must be done to desegregate and this will naturally include busing where there is any significant degree of residential segregation.

That the Court will not be deterred from using busing where it is a necessary remedy for school segregation was confirmed in another companion case, North Caroline Board of Education v. Swann, 402 U.S. 43 (1971). In that case the Court affirmed an order declaring unconstitutional a North Carolina statute prohibiting racial assignment of students and busing based on racial assignment. The Court held that a ban on racial assignment "would deprive school authorities of the one tool absolutely essential to fulfillment of their constitutional obligation to eliminate existing dual school systems." Id. at 46. The Court also concluded that the ban on busing was invalid because "bus transportation has long been an integral part of all public educational systems, and it is unlikely that a truly effective remedy could be devised without continued reliance upon it." Ibid.

The Swann cases in effect holds that in many situations there will be no remedy for segregated schools other than busing. As the remedy becomes part of the right, any limitation on busing becomes a presumptive interference with the right to an integrated education. This merger of right and remedy is the main constitutional obstacle to anti-busing legislation.

Pre-Swann Statutes

The first legislation that is relevant to this inquiry is, ironically, the Civil Rights Act of 1964. Section 407 of that Act authorizes the Attorney General

to maintain school desegregation actions upon the receipt of written complaints. And that section goes on to grant jurisdiction over such actions to the federal courts with the following proviso:

> [N]othing herein shall empower any official or court of the United States to issue any order seeking to achieve a racial balance in any school by requiring the transportation of pupils or students from one school to another or one school district to another in order to achieve such racial balance, or otherwise enlarge the existing power of the court to insure compliance with constitutional standards. 42 U.S.C. § 2000c-6(a).

The purpose appears to be to guarantee that no expansion of judicial power will result from the statute; but it is not designed to restrict "the existing power of the court to insure compliance with constitutional standards." This is the interpretation that was given to section 407 in Swann v. Charlotte-Mecklenburg Board of Education, supra at 17-18 in reliance on both the language and the legislative history of the statute. Concluding that the section was based on congressional desire not to extend the power of the federal courts to remedying de facto segregation, Swann held that section 407 was irrelevant where, as there, "state-imposed segregation" was involved. Id. at 18.

It is somewhat bewildering, therefore, that numerous members of Congress seem to believe that section 407 prohibits the federal courts from ordering busing as a remedy for de jure segregation. They have sought to label members of the Court as "blind men" and to accuse the Court of having totally ignored section 407 in Swann. Such misstatements, relying on an appeal to base emotion, call into question the motives behind anti-busing legislation. To suggest that the Supreme

Court itself violates the law when it orders busing is particularly objectionable because so patently inconsistent with the statute itself.

The approach of the 1964 Civil Rights Act was followed in the Elementary and Secondary Education Act of 1965, 20 U.S.C. § 1232(a), which prohibited the use of federal funds for the assignment or transportation of students or teachers in order to overcome racial imbalance. The legislation continued the de jure - de facto distinction, which allowed the Department of Health, Education and Welfare (HEW) to play a major role in ending de jure segregation.[12]

This effort brought congressional reaction in the late sixties and early seventies corresponding to the increase in HEW's activities in promoting desegregation. Beginning in 1969, HEW appropriation bills have carried some variation on the so-called Whitten Amendment prohibiting HEW from forcing school districts to bus students, forcing the closing of any school, or forcing any student to attend a particular school against the choice of his or her parents.[13] The force of these amendments was weakened in 1969 and 1970 by inclusion of language indicating that the prohibition on HEW activity would not apply where it conflicted with the Constitution.

Chief Justice Burger's 1971 opinion in Swann showed that, despite two Nixon appointments to the Supreme Court, the judiciary would not falter in its efforts to eradicate the vestiges of dual school systems in the south. And northern cases were beginning to work their way through the courts producing orders requiring busing. This set the stage for much more drastic anti-busing language and proposals for anti-busing constitutional amendments.

The Nixon Busing Bills of 1972

Early in the 1972 session of Congress Senator Griffin introduced an anti-busing amendment to the Higher Education Act[14] providing that,

> No court of the United States shall have jurisdiction to make any decision, enter any judgment or issue any order the effect of which would be to require that pupils be transported to or from school on the basis of their race, color, religion, or national origin.

This drastic amendment was narrowly defeated by a 50 to 47 vote on February 29, 1972. A similar amendment, introduced by Senator Dole, was defeated the next day by only a one-vote margin, 48 to 47. Meanwhile, on February 29th, the Senate had adopted the much milder Mansfield-Scott Amendment that formed the basis for the final anti-busing provisions of the Education Amendments of 1972, discussed below.

These votes were soon followed by Administration action when President Nixon outlined sweeping proposals on education and busing in a message to Congress on March 17, 1972.[15] Implementing legislation in the form of two separate bills was introduced a few days later.[16] A co-sponsor of both bills in the House was the then Republican minority leader Gerald Ford. The two bills reflected the President's two-stage plan: "an immediate stop to new busing in the short run, and constructive alternatives to busing in the long run."

The Student Transportation Moratorium Act was the short-run measure; it would have required that any busing order entered by a federal court or any busing plan mandated by HEW would be stayed until July 1, 1973, or the date of new remedial legislation offering alternatives to busing, whichever was earlier. This bill basically did not survive in any form. More important was the Administration's

long-run proposal, the Equal Educational Opportunities Act. Its stated aim was "to provide Federal financial assistance for educationally deprived students and to specify appropriate remedies for the orderly removal of the vestiges of the dual school system." It set forth a priority of remedies from which federal courts and agencies must choose "the first" or "the first combination thereof which would remedy such denial" of equal educational opportunity. The stated remedial sequence was as follows: assignment to the nearest possible school; majority-to-minority transfer plans; revision of attendance zones; construction of new schools; establishment of magnet schools or educational parks; and "any other plan which is educationally sound and administratively feasible." But specific limits would have been imposed on the use of transportation in implementation plans, depending on the level of school attended. This bill, eventually enacted in revised form in 1974, will be discussed further below. Both Administration bills raised substantial questions about their constitutionality, provoking a wave of commentary.[17] The constitutional issues are also discussed below.

These drastic bills were unsuccessful during 1972. Instead, Congress adopted a Conference Committee's milder anti-busing amendments, §§ 801-806 of the Education Amendments of 1972, 20 U.S.C. §§ 1651-1656. Section 801 prohibits the use of federal funds for busing either to overcome racial imbalance or to carry out a plan of desegregation except upon request of local school officials. And all federal officials are prohibited from requiring busing as a condition for receipt of funds. Parents or guardians of children subject to court-ordered busing are authorized by section 804 to reopen or intervene in the implementation of the order if, in

language that tracks Swann, "the time or distance of travel is so great as to risk the health of the student or significantly impinge on his or her educational process." Sections 805 and 806 were directed at problems of sectional discrimination in providing for uniform nation-wide rules of evidence to prove racial discrimination in student assignment and in providing that the portion of section 407 of the Civil Rights Act of 1964 that is discussed above applies to all public school systems in the United States, "whether ... situated in the northern, eastern, western or southern part of the United States."

Section 803, which expired by its terms on January 1, 1974, is the only section that has played any significant part in litigation. It provided that district court orders requiring transportation (as busing is euphemistically called) for the purposes of achieving a balance among students with respect to race, sex, religion, or socioeconomic status, be stayed until all appeals from such orders had been exhausted. The racial balance language of this section recalled similar language in the 1964 Civil Rights Act which had been construed in Swann as applying only to de facto segregation. The President recognized this and other significant differences between these provisions and his proposals in reluctantly signing them into law. He stated that Congress "has not provided a solution to the problem of court-ordered busing; it has provided a clever political evasion."

As predicted, section 803 did not stay any busing orders. In Drummond v. Acree, 409 U.S. 1228 (1972), Mr. Justice Powell, relying on Swann's interpretation of section 407 of the 1964 Civil Rights Act, held that section 803 applied only to de facto segregation. After this decision the lower courts treated section 803 as being

inapplicable to de jure segregation, NAACP v. Lansing Board of Education, 485 F.2d 569 (6th Cir. 1973); United States v. Board of Education, 476 F.2d 621 (10th Cir. 1973); and it expired at the beginning of 1974.

Interim Developments: Keyes and The Two Bradley Cases

Anti-busing legislation was not seriously considered in 1973, but it became an important subject of congressional concern again in 1974. In the interim period developments in the case law set the stage for the eventual congressional reaction. In 1973 the Court decided its first major school desegregation case involving a northern city - Denver. Keyes v. School District No. 1, 413 U.S. 189 (1973).

De jure segregation had been found by the district court in the northeast section of Denver, but it was held that the school segregation existing in other aress of the city was de facto. Nevertheless, the District Court ordered widespread desegregation in order to equalize educational opportunities for all black pupils in Denver. The Tenth Circuit upheld the finding of de jure segregation, but reversed the order insofar as it applied to the de facto areas on the basis that the federal courts lacked the power to grant such orders. The Supreme Court resolved the difference between the district court and the court of appeals by holding that a system-wide remedy is appropriate if it is shown that "an intentionally segregative policy is practiced in a meaningful segment of a school system" and the school authorities are then not able to meet "the burden of showing that their actions as to other segregated schools within the system are not also motivated by segregative intent." Id. at 209.

This standard of intent - certainly an unusual test to be applied by the Court[18] - has proven difficult to apply.[19] But it indicated that a heavy burden could be placed on school authorities to explain how local schools had become segregated and therefore suggested that massive school desegregation, accompanied by busing, would soon be coming to the North and West. This was certain to have an impact on Congress, an impact which was enhanced by developments in metropolitan desegregation cases.

The first metropolitan desegregation case to reach the Supreme Court was Bradley v. School Board, 412, U.S. 92 (1973), which affirmed by an equally divided Court the Fourth Circuit's reversal of a district court desegregation plan that encompassed both Richmond and its suburbs. There was no majority because Mr. Justice Powell had disqualified himself, having once been a member of the Richmond School Board. The Court granted certiorari to resolve this issue in the Detroit case and while decision in that case was pending, Congress, as dicusssed below, was considering drastic anti-busing legislation. When the Detroit case was decided and it was held that a metropolitan desegregation plan was improper, Milliken v. Bradley, 418 U.S. 717 (1974), Congress backed down somewhat.

1974: Revival of the Nixon Bill

In the 1974 session of Congress the Nixon Educational Opportunities Act of 1972 was revived in somewhat modified form. As passed by the House, the bill contained a flat ban on the transportation of students for desegregation purposes rather than the earlier proposal to ban transportation of students below the seventh

grade.[20] The House bill also contained a provision for the reopening of any desegregation plan in effect when the bill was enacted to allow modification of the plan so that it would comply with the bill.[21]

An identical proposal to the one approved by the House was introduced in the Senate by Senator Gurney of Florida. It was defeated by a 47 to 46 vote. By another vote of 47 to 46 the Senate adopted a Mansfield-Scott compromise proposal, which did not include the reopener provision. Although it also banned transportation of students to schools beyond the school closest or next closest to their homes, it softened this ban by stating that it is "not intended to modify or diminish the authority of the courts of the United States to enforce fully the Fifth and Fourteenth Amendments to the United States Constitution."[22]

The bills went to a Conference Committee and the House instructed its conferees to insist on the House busing provisions. President Nixon indicated that he might veto the entire Elementary and Secondary Education Act unless it contained the House provisions. However, the Supreme Court decision in Milliken v. Bradley, supra, was handed down while the Conference Committee was working and this appeared to mollify the House. The final Conference Report adopting the Senate language was approved in the House by a vote of 323 to 83.[23] Discussion of the legislation as finally approved, §§ 202-259 of the Equal Educational Opportunities Act of 1974, 20 U.S.C. §§ 1701-1758, will be limited here to the provisions that most affect the the courts.

Section 203 sets out several congressional findings and also contains the Senate language indicating that these provisions are not intended to affect the power

of the courts to enforce the Constitution. Section 213 provides that federal courts and agencies should use only those remedies that are necessary to correct "particular denials of equal educational opportunity or equal protection of the laws." This is apparently directed at the case-law rule, discussed above, of taking maximum steps to desegregate wherever a single violation is found. Section 214 establishes the same priority of remedies as contained in the original Nixon bill. Section 215 prohibits transportation orders beyond the school next closest to the student's home. Section 216, apparently directed at metropolitan desegregation plans, provides that school district lines may not be ignored or altered unless the lines "were drawn for the purpose, and had the effect" of causing segregation. Proceedings may be reopened under section 218 if there is a busing order in effect that would risk the health or affect the education of students. Other provisions to a large extent repeat the 1972 legislation discussed above.

Because of the qualification that this legislation is not intended to affect judicial power, it is not likely to produce any confrontation with the courts. The only reported case dealing with these statutes is Hart v. Community School Board, 512 F.2d 37 (2d Cir. 1975). There sections 208 and 215(c), which provide that population shifts producing segregation in a desegregated system do not per se form the basis for a new desegregation order, were held to apply to de facto and not de jure segregation. Id. at 52. And the Court found that section 256, which prohibits busing orders "unless the court first finds that all alternative remedies are inadequate," was inapplicable because the only alternative remedy offered to the court required more busing than the remedy adopted by the court. Id. at 43, n.70.

Prospects for the Future: Legislation

The present session of Congress has seen attempts at the passage of further anti-busing legislation that are significant not so much because of the nature of the proposed legislation, as because of the support it has gathered. While the House passed the standard Whitten amendment to the HEW appropriations bill, the Senate, after complex maneuvering, passed an amendment that may be somewhat stronger in prohibiting HEW from imposing desegregation plans that require busing. The most important aspect of the Senate action is that this amendment was sponsored by Senator Biden of Delaware, who has previously voted against anti-busing legislation, and it was supported by several other Senators who have previously been opposed to anti-busing legislation.[24] The House and Senate provisions are now being considered by a Conference Committee.[25]

The Senate has in the past few years been much more reluctant than the House to pass anti-busing legislation. The switch of Biden and several other northern liberals to the anti-busing position suggests, therefore, that stronger legislation may be forthcoming. It is difficult to imagine, however, what stronger legislation could be passed without raising severe constitutional questions. Still, if a constitutional amendment is to be passed - and I do not believe that one will - then more legislation will probably be forthcoming and a clash with the judiciary may be unavoidable.

Prospects for the Future: Constitutional Amendments

In the course of considering anti-busing legislation over the past few years, Congress has also considered numerous proposals for constitutional amendments. The most prominent proposal has been the amendment offered by Representative Lent.[26]

It would prohibit the assignment of students on the basis of race, but the effects of such an amendment are not totally clear. At present, the Senate Judiciary Committee is conducting hearings on a variety of amendment proposals, but there is no indication that any of them is likely to succeed.

Two other developments indicate that an amendment is not likely to be successful. First, President Ford has refused for the present to endorse an anti-busing amendment.[27] Second, the House Democratic Caucus recently voted down, by a vote of 172 to 96, a resolution directing Democrats on the Judiciary Committee to send to the House floor within 30 days an amendment "that would guarantee each child the right to attend the primary and secondary schools nearest his own home within his respective school district."[28] This apparently indicates that the two-thirds support necessary to pass a constitutional amendment cannot be mustered at this time. And if this is true in the House, it is even more likely to be true in the Senate.

HEW

While Congress has been mainly concerned with busing ordered by the courts, legislation has also been directed at the role of HEW in enforcing the 1964 Civil Rights Act by requiring busing. As discussed above, Congress has in recent years routinely attached amendments to HEW appropriations bills prohibiting the use of funds to require busing as part of a desegregation plan. Both the 1972 and 1974 legislation discussed above also seek to prohibit HEW from using its power over federal funding of local school districts to impose a desegregation plan involving busing upon those school districts.

It is doubtful that any of these Congressional actions were really necessary. Since the start of the Nixon administration, HEW's civil rights enforcement effort has been drastically curtailed.[29] This was shown by the case of Adams v. Richardson, 356 F. Supp. 92 (D.D.C. 1973), modified, 480 F.2d 1159 (D. C. Cir. 1973), where the Court found that HEW had failed to meet its responsibility under the 1964 Civil Rights Act to insure desegregation in hundreds of southern school districts. Two years later this case was back in court because HEW was again failing to do more than solicit voluntary desegregation plans. Adams v. Weinberger, 391 F. Supp. 269 (D.D.C. 1975). The District Court stated that:

> HEW has often delayed too long in ascertaining whether a complaint or other information of racial discrimination constitutes a violation of Title VI. HEW has also frequently failed to commence enforcement proceedings by administrative notice of hearing or any other means authorized by law although the efforts to obtain voluntary compliance have not succeeded during a substantial period of time. ...Apart from the school districts expressly covered by this Court's February 16, 1973 Order, HEW has not initiated a single administrative enforcement proceeding against a southern school district since the issuance of this Court's Order 25 months ago. Id. at 273.

An independent study of HEW by the Center for National Policy Review found that HEW enforcement of school desegregation in the North and West over the past three years had been extremely lax. Of 84 cases undertaken by HEW since 1964, only four districts had been forced to undergo formal enforcement proceedings, and funds had been cut off in only one district. Fifty-two of these cases remained unresolved as of July 1, 1973 and no enforcement of any kind has been taken in 37 of these 52 cases.[30] This inaction in the North and West resulted in the filing of a suit on July 3, 1975, to compel HEW to act.[31] Perhaps the final evidence of HEW's

position was added when the Department claimed that it could not process discrimination complaints because its responsibilities under Adams, supra, were consuming all of its resources. This claim was made despite the fact that HEW returned $2.6 million unspent to the federal treasury in the past fiscal year.[32]

Constitutional Issues

The anti-busing legislation that has thus far been enacted presents no significant constitutional issues because it has been explicitly framed to avoid such problems. However, the possibility that the legislation might be more drastic has provoked a fairly large body of legal commentary.[33] While a great deal of uncertainty prevails, some conclusions about the constitutional issues can be drawn.

A decision about the constitutionality of anti-busing legislation depends largely on the precise nature of the legislation. With that caveat in mind, we can proceed to the two possible bases for such legislation. First, there is the Congressional power to control the jurisdiction of the federal courts under Article III of the Constitution. To evaluate this basis, it must be applied to some specific form of legislation. The most often proposed possibilities are either an unqualified ban on busing orders, as was almost the case with the 1974 legislation, or a removal of federal court jurisdiction over school desegregation cases.[34]

In the case of legislation that bans busing orders, it is questionable whether such legislation is really jurisdictional regardless of whether or not its language speaks of jurisdiction. It seeks to control the power to grant a particular remedy rather than the power to hear cases involving a particular subject matter.[35] In addition, it seeks to withdraw "jurisdiction" only after the merits have been decided, but it would

then prohibit the court from ordering the busing that it had decided was required by the Constitution.[36] This is not constitutionally acceptable. Finally, there is general agreement that a total ban on busing, however characterized, would be unconstitutional since the Supreme Court has indicated, as discussed above, that busing may be an indispensable remedy for the protection of constitutional rights in come cases.[37]

The constitutionality of legislation that seeks to define when busing orders are permissible, rather than to bar such orders altogether, presents more difficult questions. But when it comes to delicate balancing of this sort, it seems clear that jurisdiction is not the issue. Such legislation is more properly considered, therefore, as an exercise of Congress' power to enforce the provisions of the fourteenth amendment under section 5 of that amendment. This section gives Congress the power to "enforce, by appropriate legislation" the substantive provisions of the amendment. This means that Congress may create remedies for violations of the equal protection clause, including school segregation which violated equal protection. This might appear to give Congress power to control busing as a remedy. However, as noted above, the remedy of busing is often indispensable for effectuation of the right. And it seems reasonable to believe that in the present political climate, the federal courts are not likely to order any more busing than appears to be absolutely necessary to protect constitutional rights.[38]

If this is the case, then congressional power to restrict busing would appear to be severely limited unless section 5 gives Congress the power to define the constitutional right and, indeed, the power to dilute that right as it has been previously

declared by the courts. Congressional power to enlarge equality is suggested by Katzenbach v. Morgan, 384 U.S. 641 (1966), where the Court held that section 5 authorized Congress to define the scope and meaning of the equal protection clause to expand its protection of minority rights beyond judicial interpretations of its direct prohibitions unaided by legislation. In that opinion, id. at 651 n.10, and since then[39] the Court has said that this does not give Congress the power to dilute constitutional rights, but the exact scope of the congressional power has remained unclear.[40]

It seems safe to say that section 5 does not authorize Congress to dilute rights independently protected by the guarantees of the Bill of Rights or to construe the due process or equal protection clauses to deny individual rights that turn "on a universal and relatively absolute rule of law not requiring evaluation of the surrounding circumstances or resolution of questions of degree."[41] The best example of a congressional contruction of the fourteenth amendment that would be prohibited is a federal statute that authorized the states to maintain segregated school systems.[42] Similarly, if busing and other remedies for school segregation are "constitutionally required remedies"[43] and therefore indispensable to the protection of constitutional rights, as suggested in Swann, it should follow that prohibition of busing as a remedy would be invalid. That does not necessarily prohibit all regulation of busing as a remedy for segregated schools. There must be some play in the joints, in which Congress could legitimately differ with the past practices of the federal courts regarding relief without going so far as to deny the power to order constitutionally necessary remedies.

> The promulgation of those principles [announced in Brown v. Board of Education] would have provided an infinitely more daunting prospect in the absence of the machinery provided by the interior federal courts. Their performance in the discharge of this difficult task has been less than even, but is it conceivable that the job could have been entrusted entirely to the state courts, bearing in mind the differences in loyalties and the vulnerability to local pressures inherent in an elective system of judges? The federal judges themselves have, even with the security provided them by the Constitution, found the going hard. It is not fanciful to think that it would have been too much for unsheltered state judges. . . . Certainly it would have been hard to ask them to risk such an exposure with so few shields.[51]

This argument is reinforced by those who say that Congress may not interfere with the performance of any judicial function that is central to the constitutional role of the federal courts. Separation of powers requires no less. Fortunately, it is unlikely that such legislation will be enacted since, in withdrawing jurisdiction over all school desegregation cases rather than just prohibiting busing orders, the legislation would probably be too broad and too apparently racist to gather majority support.

The same bottom line also applies to control over the Supreme Court's appellate jurisdiction. Any argument for such power must rely primarily on the dubious precedent of Ex Parte McCardle, 7 Wall. 506 (1896). Such legislation would be directly in conflict with the proposition advanced by several commentators that the framers intended the Supreme Court to have power to make uniform federal law and that withdrawal of this power in any class of cases is therefore improper.[52] Even Robert Bork, who helped draft and supported the Nixon bills, agrees that Congress lacks this power.[53]

Footnotes

1. N.Y. Times, Oct. 12, 1975, p. 30.

2. N.Y. Times, Sept. 9, 1973, p. 55.

3. See generally, L. Panetta & P. Gall, Bring Us Together (1971); G. Orfield, The Reconstruction of Southern Education (1969); R. Sarratt, The Ordeal of Desegregation (1966); J. Peltason, Fifty-Eight Lonely Men (1961).

4. See Bradley v. School Board, 317 F.2d 429, 438 (4th Cir. 1963); Jeffers v. Whitley, 309 F.2d 621, 629 (4th Cir. 1962); Boson v. Rippy, 285 F.2d 43, 45-46 (5th Cir. 1960); Kelly v. Board of Education, 270 F.2d 209, 229 (6th Cir.), cert. denied, 361 U.S. 924 (1959); Borders v. Rippy, 247 F.2d 268, 271 (5th Cir. 1957), 250 F.2d 690, 692-93 (5th Cir. 1957); Avery v. Wichita Falls Independent School District, 241 F.2d 230, 233 (5th Cir.), cert. denied, 353 U.S. 938 (1957); Bell v. School City of Gary, Indiana, 213 F. Supp. 819 (N.D. Ind.), aff'd, 324 F.2d 209 (7th Cir. 1963); Evans v. Buchanan, 207 F. Supp. 820, 823-24 (D. Del. 1962); Jackson v. School Board, 203 F. Supp. 701, 704-06 (W. D. Va.), rev'd on other grounds, 308 F.2d 918 (4th Cir. 1962).

5. See Thompson & Pollitt, Congressional Control of Judicial Remedies: President Nixon's Proposed Moratorium on "Busing" Orders, 50 N.C.L. Rev. 809, 816-17 (1972). One bill would have deprived the federal courts of jurisdiction to hear any suit questioning state laws relating to the public schools. H.R. 1228, 85th Cong., 1st Sess. (1957). Another bill would have deprived the Supreme Court of appellate jurisdiction in cases attacking

public school systems "on grounds other than substantial inequality of physical facilities and other tangible factors." S. 3467, 85th Cong., 2d Sess. (1958).

6. Read, Judicial Evolution of the Law of School Integration Since Brown v. Board of Education, 39 Law & Contemp. Prob. 7, 16-19 (1975).

7. The Court decided only three significant school desegregation cases during this period. Griffin v. County School Board, 377 U.S. 218 (1964) (ordering the reopening of schools that had been closed to avoid desegregation); Gass v. Board of Education, 373 U.S. 683 (1963) (holding invalid a minority-to-majority transfer plan); Cooper v. Aaron, 358 U.S. 1 (1958) (holding that desegregation could not be delayed because of interference by state officials). These cases urged more rapid progress while giving little advice on the mechanics of the desegregation process. Read, supra n.6 at 19.

8. See Read, supra n.6 at 21-28.

9. The Fourth and Sixth Circuits refused to accept the doctrine of an affirmative duty. Green v. County School Board, 382 F.2d 338 (4th Cir. 1967), vacated and remanded, 391 U.S. 430 (1968); Monroe v. Board of Comm'rs, 380 F.2d 955 (6th Cir. 1967), vacated and remanded, 391 U.S. 450 (1968). The Fifth Circuit adopted the doctrine in the Jefferson case. And the Eighth Circuit took different positions depending on the panel. Compare Barnes v. Board of Education, 381 F.2d 252 (8th Cir. 1967), rev'd, 391 U.S. 443 (1968); and Clark v. Board of Education, 369 F.2d 661 (8th Cir. 1966) (opposed); with Jackson v. Marvell School District, 389 F.2d 740 (8th Cir. 1968);

Kemp v. Beasley, 389 F.2d 178 (8th Cir. 1968); and Kelley v. Altheimer, 378 F.2d 483 (8th Cir. 1967) (supporting adoption).

10. It may appear that the identification of students by race in order to assign them to schools as part of a desegregation plan is inconsistent with Brown's outlawing of the assignment of students by race for the purpose of segregation. Indeed, anti-busing spokesmen claim that Green, Alexander, and Swann represent a full circle from Brown. However, some have contended that Brown is ambiguous because it is not clear whether the decision prohibits racial assignment or segregation - segregation understood not as action to segregate, but as a demographic fact involving separation of the races. Fiss, School Desegregation: The Uncertain Path of the Law, 4 Philo. & Pub. Affairs 3 (1974). Green, Alexander and Swann can thus be interpreted as taking the latter view of Brown as holding that whenever segregation is a foreseeable and avoidable result of government operations, those operations must be altered to prevent segregation and to promote integration. See also Fiss, The Jurisprudence of Busing, 39 Law & Contemp. Prob. 194, 199-200 (1975).

11. See, e.g., Hearings on School Busing Before Subcommittee No. 5 of the House Comm. on the Judiciary, 92d Cong. 2d Sess., pt. 1, at 39 (1972) (statement of Rep. Rarick); id. at 44 (statement of Rep. Mizell); id. at 73 (statement of Rep. Waggonner).

12. "Title VI of ... [the 1964 Civil Rights Act] proscribed discrimination in any program or activity receiving federal financial assistance, under threat of loss of funding. . . . When combined with the Elementary and Secondary

Act of 1965, . . . which greatly increased the amount of federal money available for the nation's public schools - particularly schools in low income areas such as the Deep South - Title VI of the Civil Rights Act of 1964 provided federal officials with both a powerful club and a tempting carrot. With one hand they could offer generous amounts of federal aid to recalcitrant school districts and with the other they could demand that desegregation efforts begin at the risk of the district losing all of those new found dollars." Read, supra n.6 at 17-18 n.42.

13. See, Hearings, supra n. 11 at 141 (statement of Rep. McDonald); Note, Congress and the President Against the Courts: Busing as a Viable Tool for Desegregation, 19 Wayne L. Rev. 1483, 1493-95 (1973).

14. S. 659, 92d Cong., 2d Sess. (1972).

15. 118 Cong. Rec. S. 4164 (1972).

16. H.R. 13914, H.R. 13916, S. 3388, S. 3395, 92d Cong., 2d Sess. (1972).

17. R. Bork, Constitutionality of the President's Busing Proposals, (1972); Goldberg, Administration Anti-Busing Proposals - Politics Makes Bad Law, 67 Nw. U.L. Rev. 319 (1972), Thompson and Pollitt, Congressional Control of Judicial Remedies: President Nixon's Proposed Moratorium on "Busing" Orders, 50 N. C. L. Rev. 809 (1972); Note, On Insulating Busing from Congressional Review: the Swann Right to a Racial Mixture, 22 Am. U.L. Rev. 795 (1973); Note, Congress and the President Against the Courts: Busing as a Viable Tool for Desegregation, 19 Wayne L. Rev. 1483 (1973); Comment, Breaking the Law: Antibusing Legislation and the Constitution, 3 N.Y.U.

Rev. L. & Soc. Change 119 (1973); Note, Segregation - Congress Attempts to Limit the Effectiveness of Busing Orders in School Desegregation Cases, 53 B.U.L. Rev. 235 (1973); Note, Nixon Busing Bills and Congressional Power, 81 Yale L.J. 1542 (1972); Note, Moratorium on School Busing for the Purpose of Achieving Racial Balance: A New Chapter in Congressional Court-Curbing, 48 Notre Dame Law. 208 (1972).

18. Cf. McGinnis v. Royster, 410 U.S. 263, 276-77 (1973); Wright v. City of Emporia, 407 U.S. 451 (1972); Palmer v. Thompson, 403 U.S. 212, 224 (1971); United States v. O'Brien, 391 U.S. 367, 381 (1968); with Griffin v. County School Board, 377 U.S. 218, 231 (1964).

19. See, Marshall, The Standard of Intent: Two Recent Michigan Cases, 4 J. Law & Ed. 227 (1975).

20. The sincere motives for the restrictions on busing of very young children that were contained in the Nixon bill are easily discerned, but if effective desegregation is to remain as a goal, this type of restriction on busing is extremely counter-productive. As Orfield reports, "One of the few points of consensus in desegregation studies and in interviews of school officials is that young children experience the least difficulty in adapting to desegregation." And he argued that

> Desegregation plans that operate on the assumption that children should remain in their neighborhoods for the first grades and then transfer to desegregated schools can find no support in social science research. The information we do possess about the operation of the process strongly argues for making early desegregation a top priority in litigation and planning. This is one of the few clear and unambiguous recommendations that can be made on the baiss of existing research.

Orfield, How to Make Desegregation Work: The Adaption of Schools to Their Newly-Integrated Student Bodies, 39 Law & Contemp. Prob. 314, 334-35 (1975).

21. H.R. 69, 93d Cong., 2d Sess. (1974).

22. S.1539, 93d Cong., 2d Sess. (1974).

23. 30 Cong. Q. Almanac 441 (1974).

24. See 33 Cong. Q. Weekly Report 2227 (Oct. 18, 1975); 33 Cong. Q. Weekly Report 2034 (Sept. 27, 1975).

25. 33 Cong. Q. Weekly Report 2119 (Oct. 4, 1975).

26. H.J. Res. 620, 92d Cong., 2d Sess. (1972).

27. N.Y. Times, Oct. 29, 1975, p. 36.

28. N.Y. Times, Nov. 20, 1975, p. 1.

29. For the early development of this policy, see generally, L. Panetta & P. Gall, Bring Us Together (1971). A chronology of the Nixon Administration's actions in the area of school desegregation into 1972 can be found in Hearings on the Equal Educational Opportunities Act of 1972 before the Subcommittee on Education of the Senate Committee on Labor and Public Welfare, 92d Cong., 2d Sess. at 526 (1972).

30. N.Y. Times, Sept. 6, 1974, p. 34.

31. N.Y. Times, August 13, 1975, p. 21.

32. N.Y. Times, Oct. 15, 1975, p. 49.

33. In addition to the sources cited in footnote 17, see Holmes, Effective Desegregation Without Busing: The Constitutionality of Anti-Injunction Legislation, 7 Urban L. Ann. 141 (1974).

34. For example, bills introduced by Representative (now Senator) William Scott during the 1972 session of Congress were designed to withdraw original federal jurisdiction from all controversies concerning the public schools. H.R. 12817 & H.R. 13176, 92d Cong., 2d Sess. (1972).

35. Holmes, supra n.32 at 149 n.52.

36. Cf. United States v. Klein, 13 Wall. 128 (1871); see also Comment, Breaking the Law: Antibusing Legislation and the Constitution 3 N.Y.U. Rev. L. & Soc. Change 119 (1973).

37. This point is even conceded by Bork, supra n.17 at 16 and Wright, Statement in Hearings, supra n.11 at 1631, 1633 - two prominent supporters of the constitutionality of President Nixon's anti-busing proposals.

38. In several recent cases the federal courts have declined to order the busing necessary for the maximum possible desegregation of a school district and have instead approved plans involving less busing and less integration. See N.Y. Times, Aug. 17, 1975, p. 1; N.Y. Times, Oct. 25, 1975, p. 36; Northcross v. Board of Education, 489 F.2d 15 (6th Cir. 1973), cert. denied, 416 U.S. 962 (1974); Goss v. Board of Education, 482 F.2d 1044 (6th Cir. 1973), cert. denied, 414 U.S. 1171 (1974); Mapp v. Board of Education, 477 F.2d 851 (6th Cir.), cert. denied, 414 U.S. 1022 (1973).

39. Oregon v. Mitchell, 400 U.S. 112, 128 (1971); Shapiro v. Thompson, 394 U.S. 618 (1969).

40. For commentary, see Cohen, Congressional Power to Interpret Due Process and Equal Protection, 27 Stan. L. Rev. 603 (1975); Cox, The Role of Congress in Constitutional Determinations, 40 U. Cinn. L. Rev. 199 (1971); Burt, Miranda and Title II: A Morganatic Marriage, 1969 Sup. Ct. Rev. 81.

41. Cox, supra n.40 at 254; Cohen, supra n.39 at 614-15.

42. Katzenbach v. Morgan, 384 U.S. 641, 651, n.10 (1966); Cox, supra n.40 at 254.

43. Cohen, supra n.39 at 615.

44. Cox, supra n.40 at 258.

45. Id. at 259.

46. See, e.g., Wisconsin v. Constantineau, 400 U.S. 433, 437 (1971); Sheldon v. Sill, 8 How. 440 (1850).

47. P. Bator, P. Mishkin, D. Shaprio & H. Wechsler, Hart & Wechsler's The Federal Courts and the Federal System, 11-12 (2d ed. 1973).

48. It is possible that an argument based on an allegation of an improper intent to restrict constitutional rights could be used to challenge legislation withdrawing jurisdiction over school desegregation cases. See Ely, Legislative and Administrative Motivation in Constitutional Law, 79 Yale L. J. 1205, 1308-09 (1970).

49. Eisenberg, Congressional Authority to Restrict Lower Federal Court Jurisdiction, 83 Yale L.J. 498, 500-513 (1974).

50. Id. at 521.

51. C. McGowan, The Organization of Judicial Power in the United States 16 (1967).

52. See e.g., Hart, The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic, 66 Harv. L. Rev. 1362 (1953); Ratner, Congressional Power Over the Appellate Jurisdiction of the Supreme Court, 109 U.Pa.L.Rev. 157, 201-02 (1960).

53. Bork, supra n.17 at 7.